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HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 475

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

against

ALBERT BANKS,
Respondent.

and

NINNIE BROTHERS,
Third-Party Defendant-
Respondent.

BRIEF FOR RESPONDENT, ALBERT BANKS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinion Below.

The District Court rendered no opinion. The opinion of the Court of Appeals, Second Circuit, is reported at 224 F. 2d 631.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

Whether the Court of Appeals for the Second Circuit in affirming a judgment in plaintiff's favor in a personal injury action obtained in the United States District Court, Southern District, correctly applied the law of New York to the facts where it was conceded that the New York Law was applicable.

Statement.

Petitioner, Central Hudson Gas & Electric Corporation maintained uninsulated high tension wires carrying 13,800 volts over a public highway in the City of Beacon.

Plaintiff, a steel worker employed by the third-party defendant-respondent, Ninnie Brothers, in the erection of a building adjoining the highway was shocked and severely injured while at work on the public highway when a crane and a forty-five foot long beam operated by plaintiff's fellow employee came into contact with these wires.

The cause of action was predicated on the law of New York, as decided by the New York Court of Appeals in *Pike* v. *Consolidated Edison*, 303 N. Y. 1 (July 1951), and kindred cases, that the owner of high tension wires over a public highway was bound to ascertain the time when the work of erecting a contemplated structure near the highway would begin so as to take steps to protect workmen against the dangers that were hidden in such wires and that he could be cast on damages for failure to take adequate steps to avoid injury to such workmen.

The record establishes, and the Court of Appeals below so held, that the petitioner, Central Hudson Gas & Electric Corporation had a thoroughly documented as well as actual

knowledge of the fact that construction work was going on in close proximity to its wires (Plaintiff's Exhibits 3, 4, 5, 6, 7, 13, 16 (87, 88, 1226-1229, 1300, 1565-1566, 1607, 1616-1617).

The record further establishes that despite this knowledge, Central Hudson Gas & Electric Corporation did nothing whatever to protect the workmen who it was to be expected would be in the vicinity. It posted no signs or warnings of any kind that the wires it maintained over a public highway were high tension wires (1149). This omission was made in the face of rules of the U. S. Department of Commerce that called for such cautions and signs (1148-1149). It was conceded by petitioner's engineers that such safeguards were practicable (1149) and that such signs were in petitioner's possession (1149, 1249). In addition, it was established that although the engineers were well aware of the possibility of accident by way of contact between the crane here involved and petitioner's wires, none did anything to ameliorate the expectable dangers (1168, 1177, 1182, 1202, 1209-1210, 1359).

During the course of the construction work the respondent, Banks, while at work in the highway, was shocked by the high voltage electricity in the petitioner's wires when a boom of a crane operated by another came into contact with them.

POINT ONE.

The United States Court of Appeals correctly applied the pertinent New York law.

The Trial Court limited the issue of negligence to a failure to warn. It told the jury that it was not to consider the possibility of deenergization or insulation as relevant

to petitioner's care under the circumstances. This was an undue limitation of the obligation owed by the petitioner in the maintenance of high tension wires over a public highway. *Pike* v. *Consolidated Edison Company of New York,* 303 N. Y. 1.

However, the issue is irrelevant to plaintiff's position since there is ample evidence that the respondent failed to give any warnings of the nature of its wires as was its duty under New York law. *Pike* v. *Consolidated Edison,* 303 N. Y. 1; *Carlock* v. *Westchester Lighting Company,* 268 N. Y. 345; *Braun* v. *Buffalo General Electric Co.,* 200 N. Y. 484; *Casualty Company* v. *A. L. Swett Electric Light & Power Company,* 230 N. Y. 199; *Chatfield* v. *New York State Gas & Electric Corporation,* 269 App. Div. 896; *Ward* v. *N. Y. State Gas & Electric,* 290 N. Y. 325; *Zuppa* v. *Central Gas & Electric Corporation,* 302 N. Y. 287.

The two cases cited by the petitioner, *Troidle* v. *Adirondack P. & L. Corp.,* 252 N. Y. 483 and *Buell* v. *Utica Gas & Electric Company,* 259 N. Y. 443, were not only decided long before *Pike* v. *Consolidated Edison Company of New York,* 303 N. Y. 1, but are also wholly distinguishable on the facts. In those cases the high tension wires were maintained over *private property,* a vastly different situation from that presented here where the high tension wires were maintained over a *public highway.*

We submit, therefore, that the petition lacks substantial ground because it turns upon the particular facts involved.

Sufficiency of evidence does not ordinarily induce granting of a writ. *N. Y. Cent. R. R.* v. *Kinney,* 260 U. S. 340, 346 (1922). 'Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.' *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 178 (1938). See McElwain, 'The Supreme Court's Business Under Hughes,' 63 Harv. L. Rev. 5, 13, n. 14 (1949).

'The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts * * *' *Huddleston* v. *Dwyer,* 322 U. S. 232, 237 (1944).

POINT TWO.

The United States Court of Appeals correctly ruled as to the significance of the possibility of deenergization or insulation as a measure of care.

As the Court of Appeals pointed out, the question of deenergization or insulation does not taint plaintiff's judgment.

Plaintiff, having obtained a verdict despite the trial court's excluding from the jury's consideration the possibility of deenergization or insulation, and the finding being supported by the record and approved by the United States Court of Appeals, it is clear that whatever the merits of the argument with respect to deenergization or insulation may be, they do not affect plaintiff. In any event, we submit that the Circuit Court ruled properly on that phase of the case under the New York authorities heretofore cited.

This was a negligence case, properly decided in all its aspects under well established New York Law, and presents nothing for review.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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